

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

DANIEL PEREZ,

Defendant-Appellant

DEFENDANT-APPELLANT'S
MEMORANDUM OF LAW

No. 77-1076

HELENA PICHEL SOLLEDER
C.J.A. Attorney for
Appellant
19 Rector Street
New York, N.Y. 10006
212-BO 9-2222

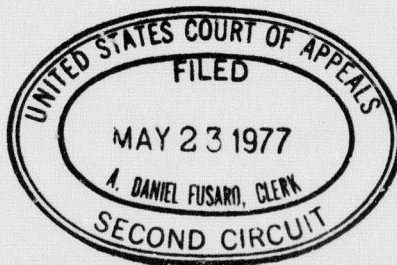


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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

No. 77-1076

Appellee,

- against -

DANIEL PEREZ,

Defendant-Appellant

STATEMENT:

This is an appeal from a judgment of conviction of a violation of Title 26, Section 7206(2) and Title 18, Section 2, United States Code on two counts of an indictment following a jury trial. The defendant was sentenced by Judge Bramwell to two years on each count to run concurrently which sentence was suspended and defendant placed on three (3) years probation with a special condition that he attend Gamblers Anonymous.

The conviction followed a retrial of counts 2 and 3 of the indictment which had originally contained three (3) counts each charging violations of the above cited statutes. In the first trial the defendant was acquitted on count 1 and the jury, after deliberating for over two days, was unable to agree on counts 2 and 3.

The indictment charged defendant with having aided and abetted and caused to be filed a false 1099 information return in that the name of the recipient of the income from payment of winning pari-mutuel triple and exacta tickets was falsely stated, misrepresented and concealed.

QUESTIONS PRESENTED

1. Whether the defendant was placed in jeopardy a second time by the second trial in that but for the Court's errors in instructing the jury he would have been acquitted on the first trial.

2. Whether the evidence of the crimes charged under the Government's theory was insufficient to sustain the conviction.

3. Whether the Court's and Government counsel's errors during the trial deprived defendant of a fair trial.

4. Whether the interests of justice mandate the setting aside of the conviction and the dismissal of the indictment.

STATEMENT OF FACTS:

In order to make clear the background of this case and defendant-appellant's double jeopardy argument it is necessary to discuss the prior trial and particularly the jury's deliberations during that trial.

THE FIRST TRIAL:

Defendant was tried on all three counts of the indictment. Count 1, of which he was acquitted, charged him with aiding and abetting and causing the preparation of a false 1099 return in that the name of the recipient of the income from payment of a winning pari-mutuel exacta ticket was falsely stated, misrepresented and concealed. The proof adduced in support of that charge was that defendant had filled out a form 317, an identification form supplied by the track which the winner of more than \$600.00 on a \$2.00 bet is required to fill out, and had used the name Miguel Valles which it was alleged was not defendant's true name; the proof on counts 2 and 3 respectively was that on or about January 21, 1976 defendant had filled out a 317 form in the name of Carlos Diaz (count 2) and that on or about January 27, 1976 defendant had filled out the form 317 in the name of Carlos Diaz. The trial lasted from July 21 through July 27. After hearing the testimony of IRS Agents Levy, Marino and Cruz, of Burns the Assistant Treasurer of the New York Racing Association, and handwriting expert Rennert - which testimony consumed no more than one (1) day - the jury acquitted defendant of having falsely filled out the name Miguel Valles on the form 317, but after deliberating for over two (2) days

on the remaining two counts (the Carlos Diaz 317 form), and sending in 12 notes to the Court, the jury was unable to agree and a mistrial was declared. During the first trial the government did not produce as a witness Carlos Diaz named in the 317 form which underlay counts 2 and 3 of the indictment.

Before the date set for the retrial and on September 1, 1976, the defendant petitioned this Court for a writ of mandamus in an effort to stay the retrial of this action. The grounds urged there were similar to those urged in this appeal-that to retry the defendant, under the circumstances of the first trial, was to place him in jeopardy a second time for a crime as to which he had been actually acquitted or would have been acquitted by the jury had the Court properly instructed it and had it directed a verdict of acquittal. The Court heard no argument but on September 3rd denied the petition for a writ of mandamus (76-3056). In that writ Judge Henry Bramwell was named as respondent so that at the time of the second trial before Judge Bramwell he was aware of defendant's position.

On November 24, 1976 defendant again moved for a dismissal of the indictment on various grounds and generally in the interests of justice. Arguing for dismissal in the interests of justice, defendant argued that acquittal of the first count was tantamount to an acquittal of the remaining two counts in that the same crime was charged. He argued that if the jury had found that no crime was committed when Daniel Perez signed

the name Miguel Valles to the 317 form it could not find that he committed a crime when he signed the name Carlos Diaz to the 317 form, if in effect it were asked to make such finding at a retrial (Appendix H). The motion was denied and the case was tried a second time.

THE SECOND TRIAL

(December 8, 9, 10, 13, 1976)

The indictment on which defendant was now tried contained but the two Carlos Diaz counts, denominated counts 2 and 3 respectively.* For the government, agent Levy testified that on January 27th and January 21st, 1976 he had observed defendant cash two winning tickets and fill out two identification forms 317 with the name Carlos Diaz, the address 148 West 17th Street, apartment 5B, social security number 129-48-1254. That on January 27, 1976 defendant had approached the previous-day-over-\$600 window, filled out a piece of paper, cashed a ticket and received money. That he was with a group of Spanish speaking people. Agent Levy approached the window after defendant had left it, obtained the forms from the clerk, and initialed them. He testified that on the basis of this 317 forms the track filled out a 1099 form. He testified that he had gone to the address listed for Carlos Diaz, had not located him there, but that he did locate Carlos Diaz through his social security number. Since agent Levy was considered an expert in the 317 and 1099 forms, counsel for defendant sought to inquire from

him whether it was considered illegal for a person to cash in a ticket for another by filling out the 317 form in the name of the true winner. The government objected to this inquiry and the objection was sustained. On redirect agent Levy testified that the government did not know who the true winner was; that it did not know if defendant Daniel Perez was and that he did not see Daniel Perez buy the winning tickets. Agent Levy further testified that he never checked the 1976 income tax return for Carlos Diaz because it would not be due until April 15, 1977: (Tr. 43- 59, 101-2-3-4).*

"By Mr. Sands:

"Q. Mr. Levy, do you know if the defendant Daniel Perez was the true winner of the two winning tickets that were presented on the date that you have testified to in January of 1976?

"A. I have no way of knowing.

"Q. So you don't know whether he was the true winner?

"A. All I know he was cashing the tickets, he got the money.

"Q. On the other hand you don't know if he was in fact the true winner, you just have no knowledge?

"A. I have no knowledge of that." (Tr. 121-122)

The next witness was agent Marino who testified that on January 21, 1976 he observed the defendant talking with a group of Spanish speaking men who evidently told him to go to the window. That defendant saw the agents, turned back, was told again by the group to go to the window and that he did so in the presence of the agents; following which, agent Marino obtained

*TR refers to trial transcript.

the paper signed by the defendant; neither agent saw what defendant had done with the money; the paper obtained by agent Marino had the name Carlos Diaz on it, 148 West 17th Street, apartment 5B, social security number 129-48-1254 which was for the triple exacta for the previous day. Agent Marino testified that he checked that address in the mail boxes and could not locate Carlos Diaz. He also testified that the defendant had seen him and knew him to be an agent as well as agent Levy and that they knew him having seen him at the track several times. Agent Marino also testified that neither he nor Agent Levy knew that the defendant's name was not Carlos Diaz until after they had arrested him. (Tr. 143-45, 160, 172-73).

The government called expert witness Rennert who testified that the handwriting on the 317 Carlos Diaz forms was written by the same person who had given exemplars (defendant on Court order had submitted 18 exemplars of his handwriting to the government). He admitted on cross examination that he had been unable to state with any certainty that the person who had written the name Miguel Valles was the defendant who had given the exemplars. This of course is the count on which defendant had been acquitted on the first trial during which expert Rennert had testified. (Tr. 206, 230-232).

Joseph Burns, Assistant Treasurer of the New York Racing Association, testified that he was responsible for filing the 1039's; he explained the procedure that the winnings are taken from the ID 317 form, that the 1099 is then prepared in quadruplicate, one copy of which is sent to the bettor and one copy to IRS; he testified that the 1099's sent to Carlos Diaz

at the address listed in the 317 were not returned until November 26, 1976 and in fact these envelopes were marked in evidence by the government and they bore the postmark November 26, 1976. He also testified that the 317, the body of it that is, is filled out by the clerk and that all the bettor does is sign his name. (Tr. 12/10/76, pages 25-26).

Agent Levy was recalled to the stand at the request of the government and he testified that at the time he swore out the complaint for defendant's arrest, which was March 22, 1976, the 1099's sent to Carlos Diaz as to which the witness Burns had testified, had not been returned to the track so that agent Levy did not know that Carlos Diaz was not a true winner and in fact did not know whether or not the 1099 had been returned to the track, addressee unknown. In fact the evidence showed that they had not been returned until November 26, 1976. (Tr. 66).

The government called Carlos Diaz who testified that that was in fact his social security number but that he had lost his social security card several times and in fact he did not even have one when he testified.

At the close of the government's case the defendant moved to dismiss the indictment on the grounds that there had been no proof by the government that the 1099's had not been filled out by the proper person since when the agent swore out the complaint to arrest the defendant charging him with a false 1099, the 1099's sent to Carlos Diaz had not been returned. Defense counsel

argued that since the statute charged the defendant with a false and fraudulent 1099 and since the complaint on which he was arrested also charged him with making out a false 1099, the government had no way of knowing that the 1099 was false at that time and there was no probable cause to arrest defendant. (Tr. 12/10, pages 101-105).

The defendant called Carlos Diaz Valle*who testified that he had lived at 114 West 17th Street for 11 years. Over defense counsel's objection the Court permitted the government to inquire of this witness whether he had ever gone to the track. This question went beyond the scope of the direct examination, however the defense's objection was overruled.

The defense called Agent Cruz who testified that he had arrested the defendant on a warrant issued by the Magistrate founded on an affidavit charging the defendant with being a "ten percenter" and with cashing tickets at the race track and taking 10% of the profit as the amount of the ticket. He described a "ten percenter" as:

"A: A ten percenter is a person who would cash winning tickets and in return he would receive 10% of the amount of the ticket."

"Q. Whose winning ticket?

"A. Someone else's - could be anyone's.

"Q. And you told Danny Perez that you arrested him for that?

"A. Yes."

*This was not the Government witness Carlos Diaz.

Agent Cruz also testified that when he searched the defendant he found no identification on him bearing either his name or the name Carlos Diaz and that the defendant had on his person under \$.25 in cash. (Tr. 12/13/76 - 16, 17, 20).

The defense called James Barry, Division Head of the New York Racing Association who had worked at the track for 45 years. Mr. Barry testified that a social security card has no address on it, and that no identification is required when a person goes to cash a winning ticket. (Tr. 12/13/76, 25, 26).

The defendant took the stand in his own behalf. He denied that he had filled out the 317 forms; he denied ever having won \$600.00 on a \$2.00 bet and he testified that he had worked at the track as a hot walker; that the track had his social security number and that they had withheld income taxes from him while he worked there; that he lost more money than he ever won. (Tr. 37, 41, 46-71).

The defense offered in evidence the exemplars of the writing of Miguel Valles which the expert on the first trial had failed to establish as being that of the defendant.

Before the case was submitted to the jury, defense counsel argued that the indictment should be dismissed because the government had failed to establish that defendant had committed any violation of law such as that charged in the indictment. Defense counsel pointed out to the Court that the cases relied

on by the government in the government's trial brief, which will be discussed hereafter, were all ten percenter cases. That agent Cruz himself had arrested this man for being a ten percenter on a warrant which charged him with being a ten percenter; that the government's entire theory in the case had been that the defendant was a ten percenter and that the proof here was contrary to any such facts because the government now charged that the defendant was the true winner, which was contrary to a ten percenter role. Counsel also argued that there had never been probable cause to arrest this defendant because the evidence now showed that at the time he was arrested the 1099's sent out to Carlos Diaz had not been returned to the track so there was no way even to suspect that Carlos Diaz was not the true winner who had in fact asked Daniel Perez to cash in the winning tickets for him. (Tr. 70-74).

The Judge denied the motions and the parties summed up.

In summation government counsel made several prejudicial remarks. The first one occurred when he told the jury that it was unclear to him and "I think it was unclear to you as to exactly what the defense was in this case." (Tr. 81). At page 87 he said:

"We all know who the real Carlos Diaz is."

At page 92, he told the jury what was not relevant to this case. At pages 118 and 119 he misquoted the evidence when he told the jury that Daniel Perez had not denied under oath that he signed those forms; in fact Daniel Perez had at page 54 of direct

examination denied that he had made out the 317's. Counsel told the jury that he didn't hear it and that he did not think that any of the jury had heard that. He also went on as follows:

"The defendant doesn't have to prove a single thing. But once the defendant takes the witness stand like any other witness, he is to be judged as any other witness and perjury is lying to the jury."

At that point defense counsel objected, moved for a mistrial and the Judge told the jury that they were to disregard that comment. At page 94 government counsel conceded that there was a reasonable doubt in this case at the very least when he told the jury:

"Whether or not Mr. Perez was in fact the true winner, he said he doesn't know." (Referring to Agent Marino and Levy's testimony). "We're not here to determine whether or not he was in fact the true winner. The indictment doesn't talk about who was the true winner." (Appendix D).

Defense counsel in her summation pointed out at page 95 that the government had acknowledged that they did not know who the true winner was and that therefore there could not be any kind of violation of the statute in question, since the 1099 information return is for the very purpose of having a tax payer or a winner report his winnings for the purpose of paying tax on them if a tax is in fact due. (Tr. 95).

THE CHARGE OF THE COURT

In its charge the Court instructed the jury on aiding and abetting. This was totally inapplicable to the case. No other person or persons was acting with defendant. The result of this confusing charge was that the jury was left to guess/^{that}the defendant maybe was a ten percenter when in fact there was no proof that he was acting for another, that he paid off anybody else and that he retained 10% of the proceeds. The Court also instructed the jury that they did not have to find that the acts charged were committed by the defendant at a certain date, that it was sufficient if they found that the offense was committed on a date reasonably near the date alleged. The Court also charged circumstantial evidence. Defense counsel objected to some of these instructions. (Appendix E , Tr. 131-135, 137-138, 143, 161).

After the jury had gone out to deliberate they came in and requested that a missing part of an exhibit be read to them. Counsel requested that this part of the exhibit be read to the jury even though it involved the penalty for a false statement and also called the Court's attention to the fact that:

"One of the jurors wanted to ask a question.

"The Court: They can write it down. I don't take questions from individual jurors and I stopped her, and I didn't get any question."
(Appendix E , Tr. 164).

THE DOUBLE JEOPARDY CLAIM AND THE
JURY'S DELIBERATIONS ON THE FIRST
TRIAL - JULY 26-27, 1976:

The jury commenced deliberating in the afternoon, in fact at 2:30 of July 26, 1976, and continued to do so until the late afternoon of July 27th during which time they sent out a total of 12 notes to the Court.*

July 26, 1976 - 5:35 P.M. Court's Exhibit 1. (Tr. 3-5) (App. F-1)

Three hours after the jury had commenced deliberating it sent its first note to the Court which said:

"What is the procedure when the jury cannot come to a unanimous decision."

In view of the brevity of the testimony and the fact that the jury could not agree after three hours, defense counsel asked the Court to discharge the jury. The Judge refused to do so and while this discussion was going on a second note came from the jury.

During discussions on count 1 defense counsel on page 4 pointed out to the Court that it would not want the jury to think it had to come to a decision.

*The 12 notes were spread on the record by Judge Bramwell, they were also marked as Court exhibits. However, the copies of these exhibits are illegible and therefore have not been submitted to the Court. The transcript of the proceedings of July 26 and 27th were filed and have become part of the record in this case and are contained in the Appendix F.

July 26, 1976 - Court's Exhibit 2. (Tr. 5-9) (App. F-1)

Court's Exhibit 2 read:

"Re: Number 1 and 2. Conceding that all the information on the 1099 is accurate and correct and that all the information on the NYRA Incorporated form number 317 is in fact accurate and correct, other than the signature which is conceded to be a forgery authorized by the person whose name is used, to wit: Don Carlos Diaz, can he be guilty of the last two counts?"

Whereupon defense counsel stated to the Court that she understood what the note was saying, it stated that the jury had reached a factual determination and was now seeking guidance on the law and requested the Court to answer "no," that on those facts they could not find defendant guilty. The Court refused and over counsel's objection brought the jury back and asked them to rephrase the question because the question it found was too long to properly respond to.

Fifteen minutes later the jury came back with note number 3.

July 26, 1976 - 5:45 P.M. - Court's Exhibit 3. (Tr. 9) (App. F-1)

Court's Exhibit number 3 read:

"If all the information on the 1099 form is accurate, can Daniel Perez still be guilty by virtue of the forged signature on the NYRA 317?"

Defense counsel again requested the Court to answer to the jury "no." That on those facts that they could not find the defendant guilty. Defense counsel then stated that if a verdict of guilty came in as a result of any further delay it would be a coerced verdict. That three questions had been asked and that the last two notes made sense. The Court disagreed, called the jury in and said to them as follows:

"Now there is confusion as to the word 'accurate'. Does that word 'accurate' mean duplication or does it mean truthful? In other words, the jury will have to go back and consider, they may send the Court another note as to whether word 'accurate' as used meant a duplication or it meant truthful. That's what the Court would like to know. Thank you." (Tr. 13-14)

Thereupon the jury left the courtroom at 6:10 P.M. and the Court sent note number 3 back in with them.

July 26, 1976 - 6:13 P.M. - Court's Exhibit 4. (Tr. 14-17, App. F-1)

Out came note number 4, Court's Exhibit 4, which had the word "truthful" in it. The Court then read the jury's note as follows:

"If all the information on the 1099 is truthful, can Daniel Perez still be guilty by virtue of the forged signature and the NYRA No. 317."

and proceeded to instruct the jury:

"...and it would be a question of fact for the jury to decide, in light of the testimony and the evidence which is before the Court, as to whether or not Daniel Perez can be so found guilty. It is a question of fact for the jury. The jury will return for deliberation."

Defense counsel objected on the ground that the question of fact had been answered by the jury and that what they wanted from the Court was a statement as a matter of law, to wit: that if the 1099 was truthful the jury had to be told that they could not find defendant guilty as a matter of law, to which the Court answered:

"They can do anything they wish. I didn't inject myself. I left it up to them. They still have that one."

This was 6:15 P.M. and the jury was sent back for further deliberations. At 6:25 P.M. defense counsel requested that the Court instruct the jury, the Court cut off counsel and said that it was not going to instruct them on anything they didn't ask for, and requested counsel to state her position at which point counsel stated that her position was they they had reached a verdict when they said "if we find the statement truthful". Counsel also reminded the Court that if a guilty verdict would come in the verdict could not stand to which the Court answered

that it would stand either way whatever the verdict was:

"I am not getting into this thing. I am telling you what I can't do. Whatever they say is alright with me."

"Mrs. Solleder: It's a question of law.

"The Court: It's not a question of law as far as I am concerned. It is a question of fact for this jury." (Tr. 15, 16, 17).

July 26, 1976 - 7:30 P.M. - Court's Exhibit 5. (Tr. 17-20) (App.F-1)

Court's Exhibit number 5 read:

"We are at a deadlock. What now?"

At which point counsel for the defense requested the Judge to instruct them on the law to which the Court answered:

"Instructions on the law, as to what?"

To which counsel replied:

"As to the elements of the offense and the facts of the 1099."

The jury was then brought inside at 7:40 P.M., asked whether they wanted to come back the following day, to which they replied yes, and the case was adjourned to July 27th. After the jury had left the Court inquired of counsel if they wanted to say anything at which point counsel for the government said that the government had nothing to say and counsel for the defense restated her position that the jury had reached a decision as to the truthfulness of the 1099 statement which was the only charge in this case and that the Court should have directed a verdict of acquittal and that the jury should not return tomorrow for further deliberations. (Tr. 19 and 20).

The following day, July 27th at 10:00 A.M., the Court convened and called in the jury. The Court informed counsel that it intended to charge them generally on the law to which counsel for the defense objected, requested a very specific

instruction and Mr. Sleppin objected to any additional instructions. Counsel for the defense requested the Court to have the government state its position as to what the law under the statute was, and the government refused to do so. Defense counsel's specific request that if the jury found the statement truthful they could not find defendant guilty was denied by the Court. Whereupon the Court proceeded to give general instructions paraphrasing the indictment and the statute. Before the jury returned to deliberate, counsel for the defense asked the Court to inquire of the jury whether they wanted any specific information answered and the Judge did not comply with this request (Tr. 3-8A) (App. F-2).

July 27, 1976 - 10:00 A.M. - Court's Exhibits 6, 7, 8.

(Tr. 3-A-6Aa)(App. F-3).

Court's Exhibit 6 read:

"Could the jury hear the minutes re: the search for Diaz."

Exhibit No. 7:

"If no information in the 1099 in counts two and number three is incorrect can these 1099's be false and fraudulent?"

to which the Court said:

"...and the answer is no."

Exhibit No. 8:

"Is the thoroughness of the government's search for Carlos Diaz a fact to dispute and if so how much weight is to be given to it by the jury?"

To which the Court instructed the jury that that was a question of fact.

July 27, 1976 - 10 P.M. - Court's Exhibit 9. (Tr. 3-8) (App. F-4).

Court's Exhibit 9 (referred to in error by the Court as Court's Exhibit 8), read:

"We would like a review of our messages to the Court and the Judge's comments on the same."

To which the Court said that the only one answered had been number 7 - "no". Whereupon defense counsel requested the Court to answer "no" to number 2 and some colloquy followed as to that. Counsel again requested the Court to ask the jury whether they wanted a further response to note number 2 stating that that unanswered question was holding the jury up in its decision. Counsel for the government told the Court that counsel for the defense was entering into the jury's deliberations, that the jury had crystalized its question in number 7 and that the Court had answered "no". The Court then proceeded to read the second part of the note which asked for a "re-reading of the Court's message to the jury before our starting of our deliberations, to wit, the four points contained in the counts" and read that part of the charge to the jury. Obviously the answer to number 7 had not crystalized everything, or the jury would have had a verdict. In any event at this point the jury was so hopelessly confused that nothing could be crystalized.

July 27, 1976 - 3:55 P.M. Note No. 10 -(Tr. 8-10) (App. F-4)

The jury requested a copy of the 4 points of the Court's charge which it had read to the jury, and this was sent in over defense counsel's objection.

Defense counsel requested the Court to answer numbers 2 and 3 and also requested the government to place its position on the record - i.e. whether if the statements were true and accurate there could be a violation of the statute - government counsel refused.

July 27, 1976 - 4:56 P.M. - Court's Exhibit 11. (Tr. 10-16, App. F-4).

Court's Exhibit 11 stated the jury was hopelessly deadlocked on counts 2 and 3, but they brought in a verdict of not guilty on Count 1. Upon inquiry the jury stated it was deadlocked on the "facts and the way the indictment was worded." (underline supplied)

Defense counsel resumed her request to have the Court answer notes 2 and 3; which was denied. In desperation defense counsel requested the Allen charge which was given, whereupon the jury sent in note no. 12 to the effect that it could not agree and the Court discharged it and declared a mistrial.

Defense counsel moved for a dismissal of counts 2 and 3, stating the grounds she had repeatedly and hopelessly advanced throughout the 2 days - the application was denied. (Tr. 3-5, 7/27/76, App. F-5).

To sum up:

At this time the jury had been out a total of 11-1/4 hours. Four notes, 2, 3, 4 and 7 referred to the information on the 317 and 1099 being "truthful," "accurate" and "correct", and containing a "forgery authorized by the person whose name is used, to wit, Don Carlos Diaz." (underline supplied)

On these facts they asked for instructions on the law which the Court refused.

POINT I:

THE DEFENDANT WAS PLACED IN JEOPARDY A SECOND TIME BY THE SECOND TRIAL BECAUSE (a) THE JURY WOULD HAVE ACQUITTED HIM HAD THE COURT PROPERLY INSTRUCTED IT; (b) THE JURY HAD FOUND THE FACTS AGAINST THE GOVERNMENT; (c) THE JURY WAS COERCED INTO ITS EVENTUAL DISAGREEMENT.

THE STATUTE:

Section 72 06 (2), of Title 26, United States Code, states:

"...any person who wilfully aids or assists in, or procures, counsels, or advises the preparation of presentation under, or in connection with any matter under, the Internal Revenue Laws, of a return, affidavit, plan, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with knowledge or consent of the person authorized or required to present such return, affidavit, plan, or document, shall be guilty of a crime."

Under the statute the government was required to prove beyond a reasonable doubt the falsity and fraudulent character of the statements contained in the 1099 and 317 forms. Not only did the Court fail to instruct the jury that it must find these facts beyond a reasonable doubt but it appears that the jury found to the contrary or at least that at no point during its deliberations did it ever make such a finding beyond a reasonable doubt.

In fact the Court agreed with counsel as follows:

"The Court: It would appear they have made a decision on certain factual decisions in the case, they haven't arrived at a verdict."
(Tr. July 26 - 5:30 P.M. - page 6 - Court's Exhibit 2, App.F-1).

Nothing could be plainer than the language of Court's Exhibit 2:

"Conceding that all the information on the 1099 is accurate and correct, and that all the information on the NYRA incorporated form No. 317 is in fact accurate and correct, other than the signature which is conceded to be a forgery authorized by the person whose name is used, to wit..." (Underlying mine)

and of Court's Exhibit 3:

"If all the information on the 1099 is accurate, ..."

and Court's Exhibit 4 that by "accurate" the jury meant "truthful"; and Court's Exhibit 7:

"No information on the 1099...is incorrect."

It appeared, and counsel so argued to the Court, that the jury thought the defendant had signed the name Carlos Diaz with the authority of Carlos Diaz - as a stand in, as it were - and if that were so there was no violation of the statute if in fact Carlos Diaz was the true winner, for in such case all the 1099 information would have been accurate irrespective of who physically signed the 317 form. In order to clear that up defense counsel requested more than once that the Court instruct the jury that such a signing was not a forgery and a violation of the statute, and that government counsel state its legal position on the facts. Both of these requests were repeatedly denied. (Tr. July 26th, pages 8-11; July 27th, pages 4-5; App. F1, 2.* That the authorized signature of Carlos Diaz is

*It appears that the jury had at this point acquitted defendant of signing the name Miguel Valles, Count 1.

what was bothering the jury is apparent from Court's Exhibits 6 and 8 wherein the jury asked for a rereading of all the testimony re the government's search for Carlos Diaz and whether the defense disputed the search and what weight should be given apparently to the failure of the government to produce Carlos Diaz. The Court bypassed that inquiry by refusing to answer it completely, when it should have given the missing witness charge so that the jury could have found that the testimony that Carlos Diaz would have given would have been unfavorable to the prosecution, that is that he had authorized defendant to sign his name in which case there would have been no violation.

The importance of Carlos Diaz's testimony and the jury's deliberations is demonstrated by the fact that when the government did produce Carlos Diaz on the retrial the jury convicted defendant.

In any event there is no need to speculate here as to what actually took place during these deliberations, for the record is devastatingly clear.

We are faced here with a question of "fundamental fairness". That a man should not be placed in jeopardy twice for the same offense is "one of the oldest ideas found in Western civilization." Bartkus v. Illinois, 359 U.S. 121, 151 (1959); and has become "part of our American concept of fundamental fairness." Brock v. North Carolina, 344 U.S. 424, 435.

The conditions for double jeopardy to attach "actual jeopardy" - the trial, and successive prosecution have been clearly met. Serfass v. United States, 420 U.S. 377 (1975); Will v. United States, 389 U.S. 90 (1967).

The importance which our Courts attribute to jury's messages is reflected in Rogers v. United States, 422 U.S. 35, where the Court reversed a conviction because the Judge had answered a jury's message ex parte, the Court holding that the jury's message should have been answered in open court and the notes filed on the record. In United States v. Schorr, 418 F. 2d 26 (2nd Cir., 1969) the jury asked two questions. The Court wrote "no" on the notes themselves. Defendant appealed because of the failure of the Court to answer the jury orally in the presence of the defendant and counsel. On appeal the Court found one of the notes incomprehensible and said that it was "grave and substantial error" to have so answered even if the defendant agreed to the procedure. The Court reversed the conviction in the following language:

"What the effect was of answering the question in the negative, as the Judge did, is impossible to reconstruct. But that it did not affect the jury's verdict one cannot say with a fair assurance. Accordingly a new trial will be necessary." (Page 30)

In United States v. Glick, 463 F. 2d 491 (2nd Cir., 1972) the Court reversed a conviction holding that the erroneous instruction affected the verdict of guilty and so the verdict had to be set aside. Similarly in Shields v. United States, 273 U.S. 583 (1927) the Court reversed a conviction because the Court's communication with the jury had a direct effect on the jury's reaching their verdict.

In Kibbe v. Henderson, 534 F. 2d 493 (2nd Cir., 1976) this Court sustained a writ of habeas corpus on a finding that the failure of the Court to instruct the jury that there must be proof beyond a reasonable doubt of "every fact necessary to constitute the crime charged" deprived appellant of due process.

In an interesting decision which has recently come down from the Supreme Court, United States v. Martin Linen Supply Co., 4/4/77, 45 L. W. 4337, affirming the 5th Circuit, the Court on the government's appeal from a Rule 29(c) order following the jury's inability to agree and its discharge, held the decision of the trial court not appealable equating it with an acquittal thus inferentially approving the Court's action. It is significant in reaching its decision the Court commented on and found persuasive the weakness of the government's case.

For a trial which took no more than one day of testimony, deliberations by a jury for almost two days with 12 questions mandated a directed verdict and discharge, and any verdict resulting therefrom was coerced, if not directed by the Court. Defense counsel repeatedly placed on the record her position that any further deliberations by the jury would amount to a coerced verdict (Tr. 7/26 - 4, 6, 13, 16, 20, App.F-1-5). Throughout, the jury had been denied effective assistance which might have produced a verdict. Counsel had requested a directed verdict of acquittal and that the jury be discharged. The Court held the jury a whole day longer after these requests were made and after they had told the Court that they were unable to agree, the outcome was inevitable.

In the face of the obvious injustice which was being done to the defendant the conduct of government counsel were not in keeping of the highest standards of that office whose duty it is to see that justice is done not that a person is convicted. If the Court was derelict in its performance or confused - it is most respectfully urged that it was - it was the duty of government counsel to join with defense counsel in an effort to see that fairness and justice were accorded defendant. Not only did government counsel fail to do this, but on the contrary it opposed all requested by counsel for defense for enlightenment of the jury, and in fact opposed any further instructions and refused to make clear its legal position, when requested by

defense counsel, to state whether if the information in the 317's or 1099's was "truthful and accurate" and the signature authorized a verdict of guilty could stand. It was obvious that counsel for the government preferred to let the jury flounder rather than come to its aid-in the hope of obtaining a conviction. (Tr. 7/27, 10:00 A.M., page 4, 3:25 P.M., page 10, App. F-1).

It was egregiously error for the Court not to answer what the jury was asking and to refuse to answer some of the questions at all. A.B.A. Standards Relating to Functions of Trial Judge, Sections 5.3, 6, 12.

The action of the Court joined in by government counsel constituted plain error, grievously prejudiced the defendant and compels a reversal of the conviction. On the ground of double jeopardy, collateral estoppel and coercion of the verdict, the conviction should be set aside and the indictment dismissed.*

*Defense counsel moved to set aside the verdict on this ground. (Tr. 12/13/76 - 70-73).

There was no waiver of the double jeopardy claim because counsel did not specifically raise it during the second trial. Defendant had already attempted to mandamus Judge Bramwell to prohibit him from retrying defendant on just this ground; and had served him with the petition seeking such relief. This was most eloquent notice to the Court that defendant considered his second trial exposure to jeopardy a second time.

Moreover, prior to the second trial counsel for defendant moved to dismiss the indictment on several grounds - one of which was that acquittal of the first count barred conviction of the remaining counts - on a theory of estoppel. The motion was denied. It was clear from all prior proceedings that any further hue and cry was futile. United States v. Grasso, Docket No. 76-1284, 2nd Circuit 3/9/77; United States v. Dinitz, 424 U.S. 600 (1976).

THE FOLLOWING ARGUMENT IS DIRECTED TO
CLAIMED ERRORS ON THE SECOND TRIAL:

POINT II:

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH
DEFENDANTS'S GUILT BEYOND A REASONABLE DOUBT
OF THE CRIME CHARGED IN THE INDICTMENT AND
UNDER THE THEORY OF THE GOVERNMENT'S CASE:

We have seen that Agent Cruz testified that he arrested defendant on the basis of information that he was a ten percenter and that he in fact notified defendant that that is why he was being arrested.

The government's trial brief specifically alluded to the facts that defendant was a ten percenter, as that term has been defined by the testimony of Agent Cruz, and relied on the three leading cases in this Circuit, to wit: United States v. Maistrow, 451 F. 2d 1342 (2nd Cir., 1971); United States v. Haimowitz, 404 F. 2d 38 (2nd Cir., 1968); United States v. Kessler, 449 F. 2d 1315 (2nd Cir., 1971). As the government pointed out in its trial memorandum the facts in those three cases were that the defendants gave their winning tickets to third persons who executed identification forms using their true identity and cashed the winning tickets for the defendants, who in turn gave them 10% of the winnings and thus concealed their true identity as being winners. (App.G) The probation report which counsel read before defendant was sentenced specifically referred to the crime for which defendant had been convicted as a ten percent type of case and referred to the investigation of ten percenters

which the agents had been conducting at the track. Similarly the grand jury testimony which is () before this Court and which is referred to in defendant's counsel's motion, made October 29, 1976 between the first and second trials to dismiss the indictment, refers to the fact that one of the grand jurors inquired of the agents whether there was a true winner present, to which the agent replied "no". (App.H) It has been pointed out that in his summation government counsel told the jury that he did not know whether defendant was the true winner or not. That this case was brought to the grand jury and that the defendant was indicted and tried on the theory of the ten percent appears quite evident also from the fact that the indictment charges him with the aiding and abetting statute—an allegation which not be necessary were he acting on his own.

It is impossible to see how the government could establish beyond a reasonable doubt that defendant was a ten percenter unless it established that he was acting for a true winner using his own identification. The theory of the government's case appears to be completely contradictory to what the proof showed because it was the government's purpose in presenting evidence to attempt to establish that the defendant was using false identification in order to conceal the true winner - whose identity the government concedes it does not know. It is significant that in those three leading cases above cited the person who was indicted was in effect the true winner and

not the messenger who physically went up to the window using his own identification and cashed in the proceeds.

Irrespective of what the language of the indictment reads it is defendant's contention that he was brought to trial on the theory of being a ten percenter and that the evidence fell far short of establishing any such activity on his part. Without determining who the real winner was, or that in fact defendant was, the jury could not reasonably and properly infer the existence of the essential elements of the offense for which defendant had been indicted. Stirone v. United States, 361 U.S. 212, (1960).

"...a conviction must rest on that charge and not another."

We cannot know whether the grand jury would have returned this indictment had it been told by the prosecutor that the government did not know whether defendant was or was not the true winner. The proof shows that the defendant was convicted of a charge which was never before the grand jury. The fact that here unlike the case in Stirone the indictment did not specify the ten percenter aspect should not change the unfairness of what took place on this trial. Ex parte Bain, 121 U.S. 1 (1887).

Finally, it is submitted that acquittal of count 1 renders the evidence as to the other two counts insufficient as a matter of law. In order to acquit defendant of count 1 the jury had to disbelieve Agents Levy's and Marino's testimony that they had seen defendant go up to the window, fill out the 317 form in a name other than his own, and that as a result of that a false 1099 had been filed in the name of Carlos Diaz as charged in counts 2 and 3. The acquittal of the defendant on count 1 also severely shook the credibility of the expert's testimony that the same person had signed the name Miguel ~~Va~~iles and the name Carlos Diaz.

On this ground, the conviction should be set aside and the indictment dismissed.*

*This was one of the grounds raised by defense counsel following the second verdict. (Tr. 12/13/76 - 70-73)

POINT III:

THE MISCELLANEOUS ERRORS COMMITTED BY THE
COURT AND GOVERNMENT COUNSEL DEPRIVED
DEFENDANT OF A FAIR TRIAL

It was error for the Court to charge the aiding and abetting statute. Either defendant did what the agents testified he did in person and alone, or he did not for there was absolutely no proof that the defendant was acting in concert with anyone else. The fact that the indictment cited Title 18, Section 2, and that the Government requested such a charge is further support of defendant's claim under Point II, supra, that the Government tried the case on a "ten percenter" theory, which as has been argued has not been established beyond a reasonable doubt. Also this charge permitted the jury to speculate as to whether defendant was or was not the true winner.

It was error for the Court to charge that the jury could find that the acts alleged had been committed at approximate dates. This was a documentary case, and the defendant filled out the 317 Forms on the dates stated therein and on no other dates. It was error to permit the jury to guess.

It was error for the Court to refuse, as defense counsel requested, to tell the jury that defendant had been acquitted of Count 1 - the case went to the jury on Counts II and III. The jury was left to speculate whether defendant might have been convicted of count I.

It was error for government counsel to tell the jury in his summation that defendant had not denied signing the 317 forms and that he had perjured himself but that he was not on trial for perjury. This mistatement had the effect of suggesting to the jury that defendant had confessed his guilt or that he had committed perjury.

Government counsel's comment to the jury that the defendant's defense was not clear to him or to the jury and that everyone knew who the real Carlos Diaz was deprived defendant of the shield or innocence and suggested that he had the burden of defending himself and had not succeeded in doing so.

These final errors were a fitting coda for a trial which should never have been brought.

POINT IV

THE INTERESTS OF JUSTICE MANDATE THE
SETTING ASIDE OF THE CONVICTION AND
THE DISMISSAL OF THE INDICTMENT.

The facts of this case commend themselves to the power of the Court to supervise criminal prosecutions.

The amount in issue is insignificant - \$622.60 (second count) - just \$22.60 over the \$600.00 where no 371 need be filled out - and \$1,250 (third count) - just \$650.00 over the \$600.00.

Defendant has been in the jaws of the prosecution for over one and a half years.

It is submitted that justice would be served by a dismissal of this indictment.

CONCLUSION:

The conviction should be set aside and the indictment dismissed on grounds of double jeopardy, insufficiency of evidence, unfairness to the defendant and the interests of justice.

Respectfully submitted,

HELENA PICHEL SOLLEDER

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

X

UNITED STATES OF AMERICA,

-against-

AFFIRMATION OF SERVICE
#77-1076

DANIEL PEREZ,

Defendant-Appellant.

X

HELENA PICHEL SOLLEDER, attorney for defendant appellant, affirms under penalty of perjury, that on the 23rd day of May, 1977 she served 3 copies of the appellant's ^{then} brief and appendix on the United States of America, by depositing in a mailbox in a prepaid wrapper, addressed to Philip Blum, Attorney Department of Justice, Appellate Section Tax Division, at Department of Justice, Washington, D.C.

Dated: May 23, 1977

Helena Pichel Solleder

